

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: CAROLE RICHARDS,	:	
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Debtor.	:	
	:	
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CAROLE RICHARDS,	:	
	:	
Plaintiff/Appellant,	:	20cv4412 & 20cv4468
	:	(DLC)
-v-	:	
	:	
CREDIT SUISSE FIRST BOSTON MORTGAGE	:	<u>OPINION</u>
SECURITIES CORP., CSAB MORTGAGE-BACKED	:	<u>AND ORDER</u>
PASS-THROUGH CERTIFICATES, SERIES	:	
2006-1, WELLS FARGO BANK, N.A., U.S.	:	
BANK	:	
NATIONAL ASSOCIATIONS, and employees,	:	
directors, representatives, and	:	
affiliated companies, of any of the	:	
above-named defendants, who directly	:	
or indirectly have participated, or	:	
participate, in the submission, in	:	
this or a related court proceeding, of	:	
information that he, she, or it knows	:	
to be untrue, said defendant(s) to be	:	
identified,	:	
	:	
Defendants/Appellees.	:	
	:	
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APPEARANCES:

For appellant Carole Richards:

M Bradford Randolph
M. Bradford Randolph, Esq., PLLC
45 Rockefeller Plaza, Fl 20
New York, NY 10111

For appellees Wells Fargo Bank N.A., U.S. Bank National Association, Credit Suisse First Boston Mortgage Securities Corp.:

Christopher A. Lynch
Reed Smith LLP (NYC)
599 Lexington Avenue
New York, NY 10022

DENISE COTE, District Judge:

Carole Richards appeals a denial of a motion for reconsideration by the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). For the reasons stated below, the denial is affirmed.

Background

Appellant Carole Richards ("Appellant") filed for bankruptcy under Chapter 13 of the United States Bankruptcy Code on August 28, 2017. U.S. Bank National Association ("U.S. Bank"), acting as the trustee for CSAB Mortgage-Backed Pass-Through Certificates Series 2006-1 ("Lender"), filed a proof of a secured claim on October 27, 2017. The claim was in the amount of \$1,827,403.81 for a mortgage on the Appellant's real property located on East 128th Street in Manhattan ("Proof of Claim"). In support of the claim, U.S. Bank filed a copy of the mortgage note ("Note").

After unsuccessfully challenging the Lender's Proof of Claim, the Appellant instituted an adversarial proceeding on

October 1, 2018 against U.S. Bank and others.¹ In that proceeding, she challenged the validity of the Note on the ground that several financial institutions had given her copies of the Note and that there were differences in the endorsements on those copies.

After the conclusion of discovery, on January 21, 2020, U.S. Bank and Wells Fargo (collectively, "Appellees") filed a motion for summary judgment. In support of that motion, the Appellees submitted a declaration by Wells Fargo's Vice President of Loan Documentation, Richard L. Penno ("Penno Declaration"). The Penno Declaration asserts that U.S. Bank has had continuous possession of the original mortgage Note since at least February 15, 2006 and includes several exhibits.

On February 18, 2020, the Appellant opposed the motion for summary judgment on jurisdictional grounds. Several weeks later, on March 12, the Appellant filed a motion to expunge, seeking to exclude the Penno Declaration from the record submitted on summary judgment. The motion to expunge principally argued that Penno is an expert witness whose identity and report should have been disclosed earlier in the

¹ The other defendants named in the adversarial action were Credit Suisse First Boston Mortgage Securities Corp., CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-1, Wells Fargo Bank, N.A. ("Wells Fargo"), and DLJ Mortgage Capital, Inc.

litigation. Of relevance to this appeal, however, the motion added that five of the exhibits to the Penno Declaration should also have been disclosed prior to the close of discovery on November 7, 2019 and therefore should not be considered in connection with the summary judgment motion. The Appellant argued that there is a question of fact as to whether U.S. Bank ever paid for the Appellant's mortgage and has a possessory interest in the Note.

On March 26, 2020, the Bankruptcy Court held a hearing on the motions. It denied the motion to expunge on the ground that Penno was not testifying as an expert witness and, as a result, the Appellees were not required to disclose his testimony earlier than they had. The Bankruptcy Court granted the motion for summary judgment, concluding that U.S. Bank had shown that it had retained possession of the Appellant's original Note at all times relevant to the litigation. On April 1, the Bankruptcy Court issued Orders formally denying the motion to expunge and granting the Appellees' motion for summary judgment for the reasons stated on the record at the March 26 hearing.

On April 15, 2020, the Appellant filed motions to reargue each of the motions (the "Motions to Reargue"). The motion to reargue the motion to expunge asserted that the five exhibits to the Penno Declaration were not timely disclosed and that they

and the passages from the Penno Declaration that had relied on them should not be considered in connection with the summary judgment motion.

On May 14, 2020, the Bankruptcy Court held a hearing on the Motions to Reargue. When asked why he had not appealed from the rulings in the adversary proceeding if he felt the Bankruptcy Court had erred, Appellant's counsel explained that he thought the Bankruptcy Court may have made a mistake since it did not specifically address on March 26 his argument that the five documents, which he characterized as important, were inadmissible. The Bankruptcy Court promptly explained, however, that it had addressed the issue and had ruled that they are admissible. The Bankruptcy Court added that it had made no material mistake regarding their admissibility or the fact that Mr. Penno was not testifying as an expert. It concluded that Appellant had not met the Rule 60(b) standard; it denied the motion to reopen the adversary proceeding. On May 19, the Bankruptcy Court issued a brief Order formally denying the Motions to Reargue for the reasons stated on the record at the May 14 hearing.

On July 17, 2020, the Appellant appealed the Bankruptcy Court's denial of her Motions to Reargue. She principally argues that the Bankruptcy Court erred in not explicitly

addressing her argument that the exhibits to the Penno Declaration should have been produced before "the discovery bar date" and therefore should not have been considered in connection with the summary judgment motion. The appeal became fully submitted on September 15.

Discussion

28 U.S.C. § 158(a) vests district courts with appellate jurisdiction over bankruptcy court rulings. A district court may "affirm, modify, or reverse a bankruptcy judge's judgment, order or decree." Fed R. Bankr. P. 8013. On appeal, the legal conclusions of the bankruptcy court are reviewed de novo, but its findings of fact are reversed only when they are "clearly erroneous." Kuhl v. United States, 467 F.3d 145, 147 (2d Cir. 2006).

The standard of review for an appeal from the denial of a Federal Rule of Civil Procedure 60(b) motion for reconsideration is abuse of discretion. Malik v. McGinnis, 293 F.3d 559, 561 (2d Cir. 2002). A trial court "'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision -- though not necessarily the product of a legal error or a clearly erroneous factual finding -- cannot be located within the range of permissible decisions." Shahriar v.

Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 250 (2d Cir. 2011). “An appeal from an order denying a Rule 60(b) motion brings up for review only the denial of the motion and not the merits of the underlying judgment. . . .” McGinnis, 293 F.3d at 561 (citation omitted).

It is helpful to begin by noting what is not at issue on this appeal. The Appellant does not appeal the Bankruptcy Court’s ruling that Mr. Penno was not testifying as an expert witness and that it could consider his declaration when addressing the Appellees’ summary judgment motion. Instead, this appeal focuses solely on certain exhibits attached to the Penno Declaration and the declaration’s discussion of them.²

Appellant asserts that five exhibits to the Penno Declaration are relevant to the Bankruptcy Court’s ruling that U.S. Bank had continuous possession of the Note “endorsed in blank,” but that they had not been disclosed to the Appellant before they were produced as attachments to the Declaration. The Appellant contends that the Bankruptcy Court erred on March 26 by not specifically addressing her argument regarding that late production, and thereby erred on May 14 in denying her Motions to Reargue.

² Appellant emphasizes the importance of page 4 of Exhibit E to the Penno Declaration.

The Appellant has not shown that the Bankruptcy Court abused its discretion in denying her Motions to Reargue. She has failed to show that the Bankruptcy Court's denial of the Motions to Reargue "cannot be located within the range of permissible decisions." Smith & Wollensky, 659 F.3d at 250. As a review of the May 14 colloquy with Appellant's counsel indicates, the Bankruptcy Court was aware of Appellant's arguments about the late disclosure of the documents attached to the Penno Declaration and rejected those arguments on March 26 in the course of denying Appellant's objection to the entirety of the Penno Declaration. The Bankruptcy Court's ruling that Rule 60(b) was not the proper vehicle to attack the March ruling was entirely reasonable.


The Bankruptcy Court did not commit error when it concluded that any challenge to its ruling on the motion for summary judgment (and the related motion to expunge from the record evidence the Appellees submitted with that summary judgment motion) should have been brought through an appeal of those rulings. After all, a court is not required to sanction a party for the late production of documents by striking them from the record. A bankruptcy court has "wide discretion" when deciding whether to impose sanctions. Design Strategy, Inc. v. Davis, 469 F.3d 284, 294 (2d Cir. 2006). The Bankruptcy Court was

entitled to reach the merits of the issues presented by the adversary proceeding at the time it addressed the Appellees' motion for summary judgment and nothing presented in the Appellant's Motions to Reargue suggests that the Bankruptcy Court acted outside its broad discretion in rejecting those Motions to Reargue.

Conclusion

The Bankruptcy Court's May 19, 2020 denial of the Appellant's Motions to Reargue is affirmed. The Clerk of Court shall enter judgment for the Appellees and remand the case for further proceedings consistent with this judgment.

Dated: New York, New York
February 3, 2021



DENISE COTE
United States District Judge